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Rethinking the State Sovereignty Interest in Personal Jurisdiction

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Abstract

The Supreme Court has never articulated a coherent theoretical justification for the law of personal jurisdiction. While some opinions state that the law is based on state sovereignty, others hold that it is instead derived exclusively from the Due Process Clause's concern for fairness. None of the opinions, however, clearly ties either of these theories to the blackletter law of personal jurisdiction. This confusion over the purpose of the doctrine has helped to create divisions both within the Court and among the Circuits on a number of important jurisdictional issues.

This Article argues that the law of personal jurisdiction must take sovereignty into serious account and provides a new interpretation of how sovereignty should inform the doctrine. Sovereignty must be considered because, when a court exercises jurisdiction over an out-of-state defendant, the state projects its sovereign power outside of its borders. The Court has imposed significant constitutional limitations on a state that projects its regulatory power beyond its borders, and analogous constitutional limitations should apply to a state court's assertion of adjudicatory power over an out-of-state defendant.

Using the scope of a state's regulatory power as a guide, this Article contends that the inherent limits of state sovereignty can explain much of the Court's modern personal jurisdiction doctrine. Most significantly, a regulatory model supports the requirement that the defendant—rather than merely the case—have minimum contacts with the forum state. Sovereignty, however, cannot explain all aspects of the doctrine. The purposeful availment requirement, for example, is tied to the subjective intentions of the defendant rather than the sovereign power of the states. Understanding how sovereignty influences the doctrine highlights the fact that some other constitutional value, such as fairness or liberty, must be at play.

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CONTENTS

INTRODUCTION

Although personal jurisdiction is perhaps the most fundamental subject in Civil Procedure, the Supreme Court has never articulated a coherent account of its theoretical underpinnings. In particular, the Justices have been unable to agree on whether the doctrine is based, even in part, on state sovereignty. Most recently, in *J. McIntyre Machinery, LTD. v. Nicastro*,[1] Justice Kennedy called state sovereignty a "central concept,"[2] whereas Justice Ginsburg, dissenting, asserted that jurisdictional rules "derive from considerations of due process, not state sovereignty."[3] The stakes of this debate are unclear, because the Court has never explained exactly what impact, if any, sovereignty has on the doctrine.[4] This hopeless confusion over the role of sovereignty has helped to create divisions both within the Court and among the Circuits on

1. 131 S. Ct. 2780 (2011).

2. *Id.* at 2788 (plurality opinion).

3. *Id.* at 2798 (Ginsburg, J., dissenting). The Court also famously switched positions on the role of sovereignty in the early 1980s. In *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), the Court asserted that the doctrine is based in part on the need to ensure that states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292. Just two years later, however, the Court in *Insurance Corp. of Ireland, LTD v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), stated that the doctrine is exclusively "a function of the individual liberty interest preserved by the Due Process Clause" rather than "federalism concerns." *Id.* at 702 n.10.

4. *See, e.g.*, Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open By* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 617, 618

a number of basic jurisdictional issues, making the modern law of personal jurisdiction frustratingly unsettled.[5]

Most scholars of jurisdiction have rejected state sovereignty as a meaningful basis for personal jurisdiction.[6] They generally argue that, while state sovereignty explains why state lines matter, the substance of the doctrine should be derived exclusively from the Due Process Clause's concern for fairness. Many of these scholars therefore argue that the doctrine should be based solely on the convenience of the parties,[7] the defendant's consent,[8] or fair play resulting from the election

(2012) ("[A]ppeal to sovereign authority does nothing to distinguish one case from the other.").

5. *See, e.g.*, Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 109–110 (2015) ("The Supreme Court has failed to agree on an analysis for specific jurisdiction cases involving limited forum contacts, and it has not resolved cases involving loosely related claims. Both gaps in doctrine stem from a single source—the failure to establish a coherent theory of specific jurisdiction."); Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 533 (2012) ("As the Court replaced a doctrine built on physical presence with one based on minimum contacts, it never adequately developed the conceptual underpinnings of the new foundation. This failure has caused profound confusion in both specific and general jurisdiction."); George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347 (2001); Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and its Progeny*, 28 U.C. DAVIS L. REV. 965, 969 (1995) ("Unfortunately, confusion between the federalism thread and the substantive due process thread has been a major source of the inconsistency and confusion in United States personal jurisdiction law.").

6. *See* sources cited *infra* note 46.

7. *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115 (1981) (suggesting a new due process test using "three factors: the degree of inconvenience that a defendant would suffer in being forced to litigate in a distant forum, the degree of inconvenience a plaintiff would suffer in being forced to proceed in a different forum, and the state's interest in having its own law resolve the controversy").

8. *See* Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 1–2 (2001) ("[T]he *consent* of the parties to select this or that sovereign to resolve their dispute best explains the overall situation [of jurisdiction]."); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 853 (1989) ("[T]he Court should have instead grounded its federal common law of jurisdiction on the principle of political consent.").

of benefits in the forum.[9] A number of scholars even argue that constitutional restrictions on personal jurisdiction are unjustified and should be abandoned altogether.[10]

This Article, however, argues that state sovereignty should be seen as a basic theoretical justification for the constitutional restrictions on personal jurisdiction. Although other scholars have recognized that sovereignty should play some role,[11] this Article directly responds to sovereignty's critics and advances a new argument for its consideration based

9. *See, e.g.*, Brilmayer & Smith, *supra* note 4, at 625–26 ("[T]he exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (quoting J. McIntyre Mach., LTD v. Nicastro, 131 S. Ct. 2780, 2785 (2011))).

10. *See, e.g.*, James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 277–282 (2004) (arguing that jurisdictional rules should be seen as federal common law rather than constitutional law); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 532 (1995) ("One solution [to stem the flood of jurisdictional litigation] is to dismantle the many barriers to personal jurisdiction erected under the supposed aegis of the Constitution and interfere only in the unlikely event that a state court has offended basic concepts of fairness to absent defendants."); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (arguing that the current approach to jurisdiction should be ended because "the law of jurisdiction is anachronistic [and spurious] due process jurisprudence"); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 20 (1990) (stating that the Court should "abandon the notion that state court personal jurisdiction is a matter of constitutional law, and relinquish its role as the final authority on the general ability of state courts to reach beyond their borders").

11. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 264–65 (2014) (arguing that the Court's personal jurisdiction "framework must give due regard to the state's regulatory and adjudicatory interests"); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 620 (2006) (stating that state sovereignty is one factor "central to determining adjudicatory jurisdiction"); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 689–90 (1987) (arguing that "assertions of jurisdiction . . . ought to reflect the general limits on state sovereignty inherent in a federal system" and that interstate federalism plays a "central and unavoidable role" in jurisdictional decisions); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85 (1980) ("[I]t is possible to make purely structural arguments in defense of sovereignty limitations which would be persuasive even if the Due Process Clause did not exist.").

on a comparison to a state's regulatory jurisdiction.[12] By borrowing principles from the regulatory context, this Article further contributes to the scholarly discussion by developing an original interpretation of how state sovereignty informs the doctrine. In sum, this Article concludes that, as a matter of state sovereignty, a state court may exercise jurisdiction only over a defendant that engaged in conduct that significantly implicated interests within the sphere of the state's sovereign power, that is, the health, safety, and general welfare of its people.[13]

Putting sovereignty into focus could help to resolve some of the most intractable issues in personal jurisdiction. For example, sovereignty helps to explain why the Court focuses on the defendant's contacts with the forum state, an approach that has troubled many scholars.[14] Understanding the theoretical basis of the doctrine could also guide the courts in a number of concrete doctrinal issues that are currently dividing the Justices and the lower courts.[15] This Article focuses on the stream of commerce issue that prompted the Court's most recent debate over sovereignty in *Nicastro*. Although Justice Kennedy's plurality opinion purported to rely on sovereignty, his restrictive approach to jurisdiction in the stream of commerce context is not based on the inherent limits of the sovereign power of the states. Notwithstanding his assertions to the contrary, Justice Kennedy's opinion therefore must be based on dubious fairness concerns regarding out-of-state corporate defendants that benefit from sales in the forum state.

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12. This Article focuses on sovereignty and does not address how fairness concerns tied to the liberty protected by the Due Process Clause may also limit jurisdiction.

13. This conclusion marks a significant break from other scholars who have considered the role of sovereignty. Drawing on a parallel to the rules governing choice of law, these scholars have concluded that a state should have the power to assert jurisdiction whenever the case implicates a state interest. *See* sources cited *supra* note 11. This Article, however, argues that the state must have an interest, not just in the case, but in the conduct of the defendant.

14. *See, e.g.*, Brilmayer & Smith, *supra* note 4, at 618 ("[W]hat *McIntyre* and *Goodyear* lack is an explanation of the connection between the individual defendant's interests and the sovereign's."); Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 130 (2001) ("First, the Supreme Court's interpretation of its "purposeful availment" test often denies plaintiffs in tort cases access to the most rational forum--in other words, the state of the injury."); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 919 (1995) (arguing that the Court "took a wrong turn" when it decided to "focus[] primarily (and sometimes exclusively) on the question of whether an out-of-state defendant had 'purposefully availed' herself of the benefits or privileges of the forum state").

15. For an excellent discussion of such unresolved jurisdictional issues, see Rhodes & Robertson, *supra* note 11.

This Article proceeds as follows. Part I sets the stage by explaining how the Court has discussed the state sovereignty interest in personal jurisdiction. Part II argues that state sovereignty should be seen as a necessary theoretical justification for the constitutional law of personal jurisdiction and responds to academic arguments to the contrary. Part III argues that a regulatory model for understanding sovereignty is superior to the choice of law model used by other scholars and provides a general outline of how sovereignty should inform the constitutional doctrine. Part IV applies this understanding to the stream of commerce issue in *Nicastro*.

I. THE SUPREME COURT'S CONSIDERATION OF STATE SOVEREIGNTY

The Supreme Court first stated that the Constitution restricts the power of state courts to assert jurisdiction in *Pennoyer v. Neff*.[16] The Court in *Pennoyer* asserted that, because "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," a state court could not constitutionally assert jurisdiction over an unconsenting defendant who was not served within the state.[17] *Pennoyer's* territorial framework was therefore justified by the inherent territorial limits of a state's sovereignty.[18] The Court used the Due Process Clause as the textual hook for its constitutional doctrine by reasoning that, if a state court lacked jurisdiction, any resulting decision would violate Due Process.[19] Because the contours of the individual right protected by Due Process were wholly defined by the power of the state, sovereignty occupied center stage under the *Pennoyer* framework.[20]

When the Court rejected *Pennoyer's* rigid territorial framework in *International Shoe*,[21] it provided no clear theoretical basis for its new

16. 95 U.S. 714 (1877). Although the courts had enforced jurisdictional limits on state courts through U.S. history, *see* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485 (2013), *Pennoyer* was the first case to explicitly state that these limitations derived from the Constitution.

17. *Pennoyer*, 95 U.S. at 720, 722. A state court, however, could assert jurisdiction based on property located within the forum. *Id.* at 723.

18. *Id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

19. *Id.* at 733.

20. *See* Borchers, *supra* note 10, at 63 (asserting that the *Pennoyer* framework "was the result of ancient notions of sovereignty").

21. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

approach to personal jurisdiction.[22] The Court famously held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[23] But what are "traditional notions of fair play and substantial justice"? The Court references party convenience,[24] reciprocal benefits arising from "the privilege of conducting activities within a state,"[25] and "the context of our federal system of government."[26] The Court therefore did not clearly embrace or reject *Pennoyer's* reliance on state sovereignty.[27]

To this day, the Court has never presented a coherent account of whether or how state sovereignty informs the law of personal jurisdiction. In *Hanson v. Denckla*,[28] the Court explained that the constitutional restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States."[29] The Court in *Shaffer v. Heitner*,[30] however, asserted that "the mutually exclusive sovereignty of the States" was no longer the "the central concern of the inquiry into personal jurisdiction."[31] *World-Wide Volkswagen Corp v. Woodson*[32] then changed course again and, echoing *Pennoyer*, stated that a key function of the doctrine is "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by

22. *See* Rex R. Perschbacher, *Foreword*, 28 U.C. DAVIS L. REV. 513, 518–19 (1995) (noting that "[t]here is still no clear test").

23. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

24. *Id.* at 317.

25. *Id.* at 319.

26. *Id.* at 317.

27. *See* Perschbacher, *supra* note 22, at 518 ("International Shoe has never completely fulfilled its promise to provide an adequate general theory of state-court jurisdiction."); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1039 (1982) ("Unlike *Pennoyer*, there is a marked absence in *International Shoe* of any discussion about the forum state infringing upon the interests of other states or harming federalism. The opinion's requirement of contacts with the forum state, however, does conform with *Pennoyer*'s emphasis on territorial sovereignty.").

28. 357 U.S. 235 (1958).

29. *Id.* at 251.

30. 433 U.S. 186 (1977).

31. *Id.* at 204.

32. 444 U.S. 286 (1980).

their status as coequal sovereigns in a federal system."[33] Just two years later, however, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*[34] inexplicably rejected *World-Wide's* analysis.[35] The Court asserted:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.[36]

One scholar summed up these cases by asserting that "the Court has accepted, then rejected, then accepted, then rejected, and then accepted the 'federalism' or 'sovereignty' factor in the jurisdictional calculus."[37]

The debate over the role of sovereignty recently reemerged in *J. McIntyre Machinery v. Nicastro*.[38] In a plurality opinion, Justice Kennedy flipped the reasoning of *Insurance Corp. of Ireland* on its head. *Ireland* had argued that, by directly protecting individual liberty, the doctrine incidentally limited sovereignty. Kennedy, however, asserted that state sovereignty, not fairness, was "central."[39] He explained that the liberty interest protected by Due Process was the "individual's right

33. *Id.* at 292. The Court also asserted that the doctrine acts "as an instrument of interstate federalism." *Id.* at 294.

34. 456 U.S. 694 (1982).

35. *See, e.g.*, Borchers, *supra* note 10, at 68 ("As quickly as the 'sovereignty' rationale came back into fashion in *World-Wide*, it went out of style in the Court's opinion next term in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee.*").

36. *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10. Following this reasoning, Justice Brennan's opinion in *Burger King* omits any reference to sovereignty and states: "The Due Process Clause protects *an individual's liberty interest* in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985) (emphasis added) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). Many subsequent decisions focus on whether a defendant has sufficient contacts with the forum without discussing the theoretical underpinnings of the minimum contacts doctrine. *See, e.g.*, Asahi Metal Indus. Co., LTD. v. Superior Court of Cali., 480 U.S. 102, 108–09 (1987) ("'The constitutional touch-stone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established "minimum contacts" in the forum state.'") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985))).

37. Borchers, *supra* note 10, at 78 (footnotes omitted).

38. 131 S. Ct. 2780 (2011).

39. *Id.* at 2788.

to be subject only to lawful power. But whether a judicial judgment is lawful," he asserted, "depends on whether the sovereign has authority to render it."[40] According to Kennedy, although the doctrine is technically grounded in the liberty protected by the Due Process Clause, its content is derived solely from state sovereignty considerations. His opinion therefore resurrects *World-Wide Volkswagen's* focus on sovereignty as a fundamental animating principle behind the law of personal jurisdiction.[41]

Justice Ginsburg's dissent in *Nicastro*, which was joined by Justices Sotomayor and Kagan, rejected Kennedy's reliance on state sovereignty.[42] According to Justice Ginsburg, "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."[43] She further explained that "[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe,* gave prime place to reason and fairness."[44] Because neither approach could garner a majority,[45] *Nicastro* did nothing to clarify the role of sovereignty within the law of personal jurisdiction.

II. SOVEREIGNTY AS A THEORETICAL JUSTIFICATION FOR PERSONAL JURISDICTION

The legal academy is also sharply divided over the theoretical basis of personal jurisdiction, including the proper role of state sovereignty. Most scholars contend that sovereignty should not be seen as an animating principle behind the doctrine and suggest a preferred alternative, such as convenience, consent, or fair play.[46] Several scholars, however,

40. *Id.* at 2789 (citation omitted).

41. Kennedy further asserted that "if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *Id.*

42. *Id.* at 2794.

43. *Id.* at 2798.

44. *Id.* at 2800. Justice Ginsburg's opinion for the Court in *Daimler* uses similar language. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) ("Following *International Shoe*, 'the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.'") (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

45. Justices Breyer and Alito issued a concurring opinion that did not stake out a position on state sovereignty. *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

46. *See, e.g.*, Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 533 (2015) (asserting that "sovereignty does not meaningfully contribute to an analysis" of when a court has jurisdiction); Wendy Collins

have bucked this trend and argued that sovereignty is fundamental.[47] These scholars recognize that an assertion of jurisdiction is an exercise of state power that requires some justification. This Section further develops this argument by drawing from the analogous context of regulatory jurisdiction and by directly responding to sovereignty's critics.

A. The Affirmative Case for Considering Sovereignty

When a court exercises jurisdiction, it issues a summons and commands the defendant to appear or face a default. Regardless of whether the defendant appears, the court may then issue a judgment that has profound consequences for the defendant, including the loss of property or liberty. No private actor has such power.[48] Instead, this power over

Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 734 (2012) [hereinafter Perdue, *What's "Sovereignty" Got to Do with It?*] ("It is true that the cases include frequent references to 'sovereignty' and 'federalism,' but these words have little analytic significance."); Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 631 (2007) (arguing that "the Due Process Clause itself does not independently protect federalism"); Goldstein, *supra* note 5, at 966 ("The Article concludes by proposing that the Supreme Court abandon the federalism thread altogether . . . ."); Borchers, *supra* note 10, at 20 (arguing that the Court should abolish all constitutional limitations on personal jurisdiction); Drobak, supra note 27, at 1017 ("Although the requirement of minimum contacts serves useful purposes, I conclude that the preservation of federalism and state sovereignty is not one of them."); Epstein, supra note 8, at 1–2 ("In my view, the *consent* of the parties to select this or that sovereign to resolve their dispute best explains the overall situation."); Redish, *supra* note 7, at 1137 ("[T]he only concern of a principled due process jurisdictional analysis should be the avoidance of inconvenience to the defendant."); Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 76 (1984) ("[F]ederalism issues raised by judicial assertions of extraterritorial jurisdiction are more appropriately resolved by Congress."); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 503 (1984) ("The time has come to remove the federalism cloud from due process limitations on state court jurisdiction so that the 'minimum contacts' requirement can be examined in the clear light of fairness to the defendant."); Trangsrud, *supra* note 8, at 853 (arguing that jurisdiction should be based on notions of consent rather than territorial power); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 561 (1991) (footnotes omitted) (arguing that personal jurisdiction doctrine should address issues of "convenience, bias, and choice of law" rather than sovereignty or legitimacy); Conison, *supra* note 10, at 1190 ("To persist in believing that sovereignty and interstate federalism are concerns of due process is to perpetuate illogic and confusion.").

47. *See* sources cited *supra* note 11.

48. Although the parties could consent to private arbitration, the authority of the arbitration award would be based on such consent.

the defendant is a component of the state's sovereignty,[49] or "supreme political authority."[50] In our system of government, every exercise of sovereign power must have some justification.

The process of identifying the source of the government's authority is familiar in the subject of constitutional law. The federal government is a government of limited powers, and every exercise of power must be tied to an enumerated power in the Constitution. A federal district court therefore may exercise jurisdiction only when authorized to do so by a federal statute, and all such statutes must be passed pursuant to a power granted to Congress in the Constitution. The Constitution, in turn, derives its authority from the people of the United States, the ultimate source of federal sovereignty. The sovereign authority of the people—and thus, by implication, the federal district courts—therefore applies throughout the country.

State sovereignty, however, does not derive from the people's ratification of the Constitution.[51] Instead, the Constitution grants limited sovereign powers to the federal government and places restrictions on the power of the states.[52] As Alexander Hamilton asserted in Federalist No. 32, after Ratification, "the State governments would clearly *retain* all the rights of sovereignty which they *before* had, and which were not, by that act, EXCLUSIVELY delegated to the United States."[53] The Tenth Amendment confirms what was already implicit in the system: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[54]

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49. *See Nicastro*, 131 S. Ct. at 2786–87 (noting that it is "the power of a sovereign to resolve disputes through judicial process . . . [and] to prescribe rules of conduct for those within its sphere").

50. Black's Law Dictionary defines the term "sovereignty" as "[s]upreme dominion, authority, or rule," and further defines "state sovereignty" as "[t]he supreme political authority of an independent state." *Sovereignty*, BLACK'S LAW DICTIONARY 1524 (9th ed. 2009).

51. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("The same does not apply to the States, because the Constitution is not the source of their power.").

52. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 159 (2010) (discussing communications between Madison and Jefferson regarding the division of powers granted to the federal government and the states).

53. THE FEDERALIST NO. 32 (Alexander Hamilton) (emphasis added). James Madison similarly stated that the Constitution was "party federal and party national" because it "leaves to the several States a residuary and inviolable sovereignty over all other objects" not delegated to the federal government. THE FEDERALIST NO. 39 (James Madison).

54. U.S. CONST. amend. X.

Wholly apart from the ratification of the Constitution, the people of each state granted sovereign power to the states.[55] This local source of sovereignty places significant limitations on state power. Whereas the power of the federal government is limited by the scope of its enumerated powers, the power of each state is inherently limited by the scope of legitimate authority of the people of each state. Each state's police power—its "general power of governing"[56]—includes only the power that the people of each state have the ability to grant.[57] In other words, while federal power is limited by subject matter, state power is limited by geography. The people of Virginia, for example, cannot grant the state of Virginia a general power of governing over Maryland.[58]

A state court's exercise of jurisdiction over an in-state defendant is therefore easy to justify from the standpoint of state sovereignty. Just as a state's police power justifies regulation of in-state conduct, its police power also authorizes the assertion of adjudicatory power within the state. In other words, if the people of Virginia can regulate a defendant's conduct while he is in Virginia, they also have the sovereign power to authorize a lawsuit against a defendant in Virginia.

Because of the limited geographical scope of the state's police power, however, it is more difficult to justify a state's assertion of sovereignty—whether regulatory or adjudicatory—over an out-of-state defendant. As the Supreme Court has explained, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'"[59] The rules governing a state's extraterritorial power in the regulatory context can therefore inform how state sovereignty operates in the

55. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 325 (1816) ("[T]he powers of the states depend upon their own constitutions . . . ."); Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. (forthcoming 2016).

56. *Sebelius*, 132 S. Ct. at 2578.

57. *See* M'Culloch v. Maryland, 17 U.S. 316, 428–29 (1819). In *M'Culloch*, the Court held that Maryland could not tax the federal bank in part because the people of Maryland did not have the power to authorize Maryland to effectively tax the nation. *Id.* at 429–430 ("[W]e measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government.").

58. *See* Bigelow v. Virginia, 421 U.S. 809, 827–28 (1975) (asserting that "Virginia's police powers do not reach" "activities outside Virginia's borders").

59. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)). *See also* J. McIntyre Mach. LTD v. Nicastro, 131 S. Ct. 2780, 2786–87 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. . . . This is no less true with respect to the power of a sovereign to

context of adjudicatory jurisdiction. In both situations, the state is using its police power, which derives from the people of the state, to control things outside of the state. Because the limitations on state sovereignty are based on geography rather than subject matter, the scope of a state's regulatory and adjudicatory power should be similar.

In the regulatory context, the Supreme Court has held that a state cannot directly regulate conduct "that takes place wholly outside of the State's borders."[60] In other words, a state may not "project its legislation into [other States],"[61] or "attempt 'directly' to assert extraterritorial jurisdiction over persons or property."[62] This limitation on state regulatory power is derived from the dormant Commerce Clause and "the inherent limits of the enacting State's authority."[63]

This seemingly simple prohibition on extraterritorial state regulatory power, however, has proven as difficult for the Court to apply as its rules for personal jurisdiction.[64] The reason is simple: even if a state regulation directly applies only to in-state conduct, virtually every state regulation has some effects beyond its borders. The Court has struggled to draw a line between permissible and unconstitutional extraterritorial effects, resulting in a confusing line of cases that is open to drastically

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resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.").

60. *Edgar*, 457 U.S. at 642. *See also* Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (same); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996) ("[I]t is clear that no single State could . . . impose its own policy choice on neighboring States."); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986) (holding a New York statute invalid in part because it improperly "directly regulated commerce" in other States).

61. *Brown-Forman*, 476 U.S. at 583–584 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)).

62. *Edgar,* 457 U.S. at 643 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

63. *Healy*, 491 U.S. at 336. *See also BMW*, 517 U.S. at 572 (citing "principles of state sovereignty and comity"). Other scholars have likewise found that the extraterritorial doctrine is based on notions of sovereignty. *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060, 1093 (2009); David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem* of *State Antidilution Laws*, 67 TUL. L. REV. 1, 40 (1992).

64. *See* Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423, 424 n.3 (2015) (collecting sources claiming that the prohibition on extraterritorial regulation is confusing and incoherent) [hereinafter Schmitt, *Extraterritoriality*].

different interpretations.[65] For example, while applying this doctrine, the Court upheld a state regulation requiring shareholder approval before a change in control of a company chartered under the laws of the state,[66] but struck down a law that required approval for a company in which at least ten percent of the shareholders were state residents.[67] Lower courts have upheld in-state labelling requirements that had the practical effect of forcing companies to change their national labelling practices,[68] but struck down regulations requiring a company selling in-state products to change their labeling practices in other states.[69] Although Part III of this Article will argue that these cases can be reconciled, the point for present purposes is that, whenever a state's sovereign power reaches beyond its borders, serious and difficult issues of state sovereignty follow.

State sovereignty concerns are equally applicable to the assertion of adjudicatory power over an out-of-state defendant as to the extraterritorial application of state regulatory power. Just as Virginia lacks the authority to regulate the rest of the country, it also lacks the power to force the people of the United States to submit to its courts. When a Virginia court asserts jurisdiction over a citizen of Maryland and commands him to appear, some justification for Virginia's exercise of sovereign power is needed. Each state's adjudicatory power is derived from its police powers, and, like in the regulatory context, the police powers granted by the people of Virginia do not typically extend into Maryland.

The constitutional restrictions on personal jurisdiction therefore must take sovereignty into account in a serious and substantive way. Although nothing in the text of the Constitution explicitly limits the jurisdiction of state courts based on sovereignty or federalism concerns, the Constitution is not the relevant source of authority. The structure of federalism in the United States, and especially the source of the sovereign power of the states, unquestionably limits the power of a state to regulate extraterritorial conduct. This same reasoning dictates that the scope of state sovereignty must limit a state's assertion of personal jurisdiction over out-of-state defendants.

65. *Id.* at 440 (arguing that lawyers and courts have interpreted the rule to mean that extraterritorial effects are always impermissible, never present constitutional difficulties, and various positions in between).

66. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987).

67. *Edgar*, 457 U.S. at 627, 646.

68. Nat'l Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104, 111–12 (2d Cir. 2001).

69. Am. Beverage Ass'n v. Snyder, 700 F.3d 796, 810 (6th Cir. 2012).

B. Responding to Sovereignty's Critics

Most legal scholars, however, contend that state sovereignty is not a meaningful theoretical basis for the constitutional law of personal jurisdiction.[70] Four major lines of argument emerge from the literature. First, scholars contend there is no historical support for using sovereignty or federalism concerns to impose constitutional limitations on state court jurisdiction because, at least prior to *Pennoyer*, the law of jurisdiction was part of the common law rather than constitutional in nature.[71] Under this argument, federalism concerns should be left to Congress, which has the power to rewrite the jurisdictional rules.[72]

Legal history, however, strongly supports a sovereignty-based approach to jurisdiction. The requirement of jurisdiction is older than the Constitution[73] and, even after Ratification, was understood to be a function of both "eternal principles of justice" and the inherent limits of state sovereignty.[74] As Justice Story held in *Picquet v. Swan*,[75] "no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions."[76] Leading nineteenth

70. *See* sources cited *supra*, note 46

71. Redish, *supra* note 7, at 1123 ("Judicial decisions recognizing limitations on the reach of a state's personal jurisdiction in the pre-Civil War United States were not based on constitutional principles."); Borchers, *supra* note 10, at 23 ("[P]rior to *Pennoyer* the Court treated personal jurisdiction as a matter of federal common law."); Conison, *supra* note 10, at 1076.

72. Weinstein, *supra* note 10, at 278 ("[B]y mistakenly casting common law federalism concerns as dictates of constitutional law, the Court has arrogated to itself power that, under our constitutional scheme, properly belongs to Congress."); Goldstein, *supra* note 5, at 966 ("[T]he allocation of personal jurisdiction among the states—cannot be remedied by sporadic case law decisions, but rather requires a comprehensive legislative solution."); Abrams & Dimond, *supra* note 46, at 87 ("This Article contends that the ultimate responsibility for resolving federalism concerns over state courts' extraterritorial jurisdiction should rest not with the Supreme Court but with Congress, a body institutionally better equipped to legislate federalism outcomes that are sensitive to the needs of the states.").

73. Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 492 (2013) (discussing cases) [hereinafter Schmitt, *Full Faith and Credit*].

74. *Id.* at 517 (quoting Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting)). *See also* Weinstein, *supra* note 10, at 185 (quoting Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting)) ("Among these all-but-immutable precepts was . . . the rule 'that jurisdiction cannot be justly exercised by a state . . . over persons . . . not subjected to their jurisdiction by being found within their limits.'").

75. 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).

76. *Id.* at 612. *See also* Lincoln v. Tower, 15 F. Cas. 544, 546 (C.C.D. Ill. 1841) (No. 8,355) ("[I]f, upon the face of such record, a want of jurisdiction appears, it cannot be received as evidence. It does not bind the defendant, nor can

century treatises likewise stated that a state's sovereign power, including its power to assert jurisdiction, did not extend beyond its borders.[77] *Pennoyer's* heavy reliance on state sovereignty as an animating principle of personal jurisdiction was merely a continuation of a long and consistent historical practice.[78]

Although nineteenth century jurists did not tie the doctrine of jurisdiction to any particular textual provision, *Pennoyer's* grounding of the doctrine in the Constitution is fully justified.[79] Long before textualism gained prominence in the law, nineteenth century jurists believed that universal and "*eternal* principles of justice"[80] like jurisdiction were as fully enforceable against the government as the explicit text of the Constitution.[81] Scholars have therefore been too quick to argue that the lack

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it conclude his rights. The laws of every empire have force only within its own limits."); Steel v. Smith, 7 Watts & Serg. 447, 448 (Pa. 1844) ("Jurisdiction of the person or property of an alien is founded on its presence or situs within the territory. Without this presence or situs, an exercise of jurisdiction is an act of usurpation.") For cases stressing the individual rights justification behind the requirement of jurisdiction, see Schmitt, *Full Faith and Credit*, *supra* note 73, at 517–18.

77. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1307, at 183 (Boston, Hilliard, Gray, & Co. 1833) ("The constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 100 (New York, O. Halsted 1827) ("The force of the [sovereign power of the states] cannot be permitted to operate beyond the limits of the territory, without affecting the necessary independence of nations."); 2 J. I. CLARK HARE & H. B. WALLACE, AMERICAN LEADING CASES: BEING SELECT DECISIONS OF AMERICAN COURTS 818 (Philadelphia, T. & J. W. Johnson & Co., 4th ed. 1857) ("[A]lthough the operation of a judgment as evidence, may extend indefinitely, its effect as a remedy, cannot reach beyond the boundaries of the sovereignty in which it has its origin, or the jurisdiction of the court by which it is pronounced.").

78. *See, e.g.*, Weinstein, *supra* note 10, at 208–09.

79. Scholars have debated whether the doctrine was actually made constitutional law in *Pennoyer* or in later cases. *See* Borchers, *supra* note 10, at 37–38 ("Commentators, and more recently the Court, have . . . referred to the due process discussion [in *Pennoyer*] as 'dictum' . . . ."). For the purposes of this article, it is sufficient to note that the Court eventually made the jurisdictional rules into a constitutional requirement.

80. *Mills*, 11 U.S. (7 Cranch) at 486 (Johnson, J., dissenting) (emphasis added).

81. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION, PROFILES OF LEADING AMERICAN JUDGES viii–xi (3rd ed. 2007) ("[M]any provisions of the Constitution included terms, such as 'contracts,' 'commerce,' 'speech,' 'due process,' and 'equal protection,' whose meaning in individual cases was not self-evident. In those cases the techniques of the oracular judge was to infuse the terms with background assumptions drawn from principles of natural law, political economy, or social organization."); Rhodes, *supra* note 46, at 583 ("[D]ue process was not typically invoked in the antebellum

of a textual mooring makes the consideration of sovereignty a subconstitutional rule that is alterable at will by Congress. In fact, during the nineteenth century, cases and treatises asserted or implied that Congress had no power to alter state court jurisdiction.[82] This makes sense when jurisdiction is viewed through the lens of sovereignty, because, at this time, the widely accepted theory of "dual sovereignty" posited that Congress had no power to limit or expand state sovereignty.[83] Moreover, the Court has constitutionalized numerous other structural principles without a clear textual basis for doing so, especially in the context of state sovereignty and federalism.[84]

Congress is also not the appropriate branch of government to make broad rules regarding the scope of state power. The Constitution divided sovereignty between the federal government and the states, leaving the Supreme Court, not Congress, as the ultimate arbiter of the division of sovereign power.[85] Giving Congress a general power to limit the scope of state judicial power—an important aspect of state sovereignty—

period as the foundation for the then-existing substantive limitations on governmental authority, which were thought to proceed from natural or fundamental 'principles of justice' rather than a specific textual constitutional provision. Hence, the fact that the courts had not established a strong link between personal jurisdiction and due process during the antebellum period does not indicate that personal jurisdiction is not a species of substantive due process.").

82. *See* Lincoln v. Tower, 15 F. Cas. 544, 546 (C.C.D. Ill. 1841) (No. 8,355) (Opinion by McLean, J. while riding circuit) ("It will not be contended by any one, that the constitution or law enlarges the jurisdiction of the state court. The power to do this is not conferred on the federal government."); Steel v. Smith, 7 Watts & Serg. 447, 451 (Pa. 1844) ("Certainly [the Constitution] was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty . . . ."); THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA §§ 205–212 (Philadelphia, T. & J. W. Johnson & Co. 1858) ("Congress can give no effect to a judgment in another State, which it did not have under the laws of the State where rendered."); Schmitt, *Full Faith and Credit*, *supra* note 73, at 521 (arguing that, although its language is confusing, Story's *Commentaries on the Constitution* states that Congress cannot change jurisdictional rules created by the Court).

83. *See* 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 201–02 (7th ed. 1991); THE FEDERALIST NO. 39 (James Madison) (asserting that the states have "inviolable sovereignty").

84. *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2024–25 (2009).

85. *See* LACROIX, *supra* note 52, at 164 ("By adopting the Supremacy Clause . . . the delegates turned . . . toward a vision of federal authority that relied not on legislatures but on judges and courts to mediate among disparate sources of law."); *cf.* Ableman v. Booth, 62 U.S. 506, 519 (1858) (holding that the Supreme Court is the ultimate arbiter between state and federal power).

would therefore violate the separation of powers envisioned by the framers. In sum, there is ample historical support for the consideration of sovereignty within a constitutional law of personal jurisdiction.[86]

In a second line of argument, scholars also argue against consideration of sovereignty by pointing out that the textual basis for personal jurisdiction is the Due Process Clause, which protects the liberty of individuals rather than state power.[87] This critique is also unconvincing. The Due Process Clause limits the sovereign power of the states by prohibiting them from denying "life, liberty, or property without due process of law."[88] As the Court explained in *Pennoyer*, an individual has a liberty interest in being free from the sovereign power of a state that lacks jurisdiction.[89] In this way, restrictions on state sovereignty are "a function of the individual liberty interest preserved by the Due Process Clause."[90] In other words, defendants have a liberty interest in not being coerced by a state that lacks sovereign authority, just as they have a liberty interest against unjustified coercion by other state actors. When a state court hears a case over which it lacks jurisdiction, it has acted without valid sovereign authority. The defendant can then use the vehicle of the Due Process Clause to challenge the state's invalid assertion of power. Although framed in liberty, the substance of the individual right is therefore defined by the scope of state sovereignty.[91]

86. Moreover, there is a strong argument that none of Congress's enumerated powers authorize Congress to create jurisdictional rules for state courts. Relying on Congress's commerce power is dubious given the rule from *Lopez* and its progeny that Congress may only regulate economic activity. United States v. Lopez, 514 U.S. 549 (1995). I have argued elsewhere that Congress has no such power under the Full Faith and Credit Clause. *See* Schmitt, *Full Faith and Credit*, *supra* note 73, at 530–32, 543–44.

87. *See* Rutherglen, *supra* note 5, at 361–62 (noting that the Court's conclusion that "[t]he restrictions on personal jurisdiction" stem from territorial limitations "has trouble explaining how territorial limitations are connected to the Due Process Clause, which the Court invokes to restrain state power"); Drobak, *supra* note 27, at 1033 ("The amendment does not say a word about protecting state sovereignty or federalism."); Redish, *supra* note 7, at 1114 ("[N]otions of federalism as limitations on the reach of personal jurisdiction are found nowhere in the body of the Constitution, much less in the terms of the due process clause."); Borchers, *supra* note 10, at 78 ("The suggestion in *Pennoyer* that due process has anything to do with the territorial reach of state courts was ill-considered."); Conison, *supra* note 10, at 1188 ("And, most problematic, [the Court] has never explained why concerns with federalism should be read into the Due Process Clause.").

88. U.S. CONST. amend. XIV, § 1.

89. Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

90. Ins. Corp. of Ir., LTD. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

91. As Stein contends, "Due process protects the sovereign interests of other states, but only incidentally, through its protection of the individual from

The second argument against serious consideration of sovereignty therefore boils down to nothing more than semantics.

Third, scholars argue that federalism concerns serve no meaningful role and have muddled the doctrine.[92] Admittedly, there is some truth to the argument that sovereignty complicates the doctrine; however, the complexity of the sovereignty argument does not mean that it can be ignored. It is fundamental that the government must have some justification for every exercise of its coercive power. Moreover, the remainder of this Article argues that sovereignty plays a significant role in shaping the blackletter law.

Fourth and finally, scholars have asserted that sovereignty is irrelevant because "[c]ourts do not compare sovereign interests when deciding jurisdictional issues"; instead, courts focus on the interests of the defendant.[93] This last argument misconceives the role of sovereignty in the jurisdictional analysis. Although the weighing of state interests is common in choice of law, an area that is often compared to personal jurisdiction, a state's power to regulate extraterritorial conduct provides a much better comparison. Because the doctrine in the regulatory context does not use the interest analysis of choice of law, we should not expect to find such weighing of interests in personal jurisdiction. As explained in the following Section, the nature of state sovereignty implies that personal jurisdiction should be subject to significant constitutional limitations.

III. SOVEREIGNTY'S IMPLICATIONS FOR PERSONAL JURISDICTION

Legal scholars have essentially divided into two camps on the question of how sovereignty affects the doctrine of personal jurisdiction. First, a number of scholars contend that "[d]espite the Court's talk

illegitimate assertions of state authority. Legitimacy, though, is defined by reference to the state's allocated authority within the federal system." Stein, *supra* note 11, at 711.

92. Perdue, *What's "Sovereignty" Got to Do with It?*, *supra* note 46, at 737; Trammel, *supra* note 46, at 532–33; Brilmayer & Smith *supra* note 4, at 618; Borchers, *supra* note 10, at 63; Conison, *supra* note 10, at 1190.

93. Drobak, *supra* note 27, at 1065. *See also* Perdue, *What's "Sovereignty" Got to Do with It?*, *supra* note 46, at 737 ("Despite the Court's talk about federalism and sovereignty, these concepts do not do any analytic work in *World-Wide Volkswagen*, and neither the state nor state sovereignty are at the center of its analysis."); Trammel, *supra* note 46, at 532–33 ("But despite the constitutive role that [sovereignty] plays in defining judicial power; it does very little analytical work in answering specific questions."); Brilmayer & Smith, *supra* note 4, at 618 ("[I]t is difficult to see sovereignty as the lynchpin of personal jurisdiction because nothing in the concept of sovereignty itself explains what is at stake for individual liberty.").

about federalism and sovereignty, these concepts do not do any analytic work."[94] According to these scholars, because the substantive rules of personal jurisdiction are based on defendants' liberty interests, not the interests of the states, sovereignty cannot explain the modern doctrine and its focus on the defendant.[95] The Justices mention sovereignty only because defendants' liberty interests constrain the judicial power of the states.[96] Under this view, to the extent that sovereignty has any effect on the doctrine, it merely explains why state borders matter in the jurisdictional analysis.

Second, several scholars have argued that jurisdictional rules based on sovereignty should mirror a court's choice of law analysis.[97] In the choice of law context, a state court has the constitutional authority to apply the substantive law of any state that has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[98] Modern choice of law analysis then looks to see which state has the greatest

94. Perdue, *What's "Sovereignty" Got to Do with It?, supra* note 46, at 737. *See also* sources cited *supra* note 46.

95. *See* Brilmayer & Smith, *supra* note 4, at 625 ("If notions of federalism and state sovereignty are to play a critical role in the future of personal jurisdiction, they will either have to be tied to individual interests, or the doctrine will have to undergo substantial change."); Perdue, *What's "Sovereignty" Got to Do with It?, supra* note 46, at 737–38 ("[T]he reality of modern personal jurisdiction doctrine—that it was no longer a state-centered doctrine, but defendant-centered instead.").

96. *See* Perdue, *What's "Sovereignty" Got to Do with It?, supra* note 46, at 741 ("[D]efendants have a liberty interest in not being subject to the governmental authority of a state with which they have not affirmatively affiliated themselves.").

97. *See* Rhodes & Robertson, *supra* note 11, at 264–65 ("As the core attribute of internal sovereignty is power over those within the sovereign's boundaries, a state without such regulatory authority is not truly sovereign. The state's adjudicative authority should thus encompass those circumstances in which it has legislative jurisdiction to prescribe rules of conduct for nonresidents affiliating with the forum."); Spencer, *supra* note 11, at 636, 658–59 ("A closer affinity between choice-of-law analysis and the law of jurisdiction is desirable because significant differences between a state's authority to enact legislation applicable to a dispute and its authority to adjudicate that dispute make little sense."); Stein, *supra* note 11, at 742–43 ("When the application of forum law cannot advance that interest, few conflicts approaches select forum law. Similarly, when the assertion of jurisdiction cannot implicate the welfare of person within the state's borders, a court should decline the plaintiff's invitation to adjudicate the controversy."). Because these scholars all look to choice of law rules for guidance, they reach conclusions regarding the types of state interests that would justify jurisdiction that differ from those of this Article. Most importantly, unlike this Article, they conclude that there is no link between sovereignty and the Court's focus on the contacts of the defendant.

98. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

interest in the case, while often placing a thumb on the scale in favor of the forum state.[99] Applying this choice of law paradigm, these scholars contend that a state court has the power to exercise jurisdiction whenever it has a sufficient interest in the case.[100] According to these scholars, the modern doctrine is far too restrictive as a matter of sovereignty, because a state will often have a strong interest in cases where the defendant lacks minimum contacts.[101] The Court's defendant-centric approach, they contend, can therefore only be justified by notions of consent or reciprocity from the Due Process Clause.

Both of these approaches to state sovereignty are wrong. Choice of law is not the best model for evaluating the scope of a state court's adjudicatory power; instead, the Court's regulatory jurisdiction provides a superior paradigm. And, if sovereignty in the adjudicatory context were treated the same as sovereignty in the regulatory context, it would have major ramifications for the doctrine of personal jurisdiction.

A. Rejecting the Choice of Law Model

As more fully explained above, because a state's sovereignty is derived from the people of the state, a state generally cannot project its regulatory or adjudicatory power beyond its borders. This explains why traditionally a state court could not exercise jurisdiction over an out-of-state defendant or regulate a person's out-of-state conduct. As the Supreme Court's has held, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'"[102] Although *International Shoe* abandoned the strict requirement of in-state presence, it did not abandon the idea that an exercise of jurisdiction, like the application of a regulation, is an exercise of sovereign power. The only difference between adjudicatory and regulatory jurisdiction is the branch of state government—judicial or legislative—that is exercising sovereignty. However, the inherent limitations on the scope of state sovereignty are based on geography rather than subject matter. The scope of a state's adjudicatory and regulatory power should therefore be the same.

99. *See* Stein, *supra* note 11, at 739–48 (discussing choice of law analysis).

100. *See* sources cited *supra* note 11.

101. *See* sources cited *supra* note 11.

102. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)). *See also* J. McIntyre Mach., LTD. v. Nicastro, 131 S. Ct. 2780, 2786–87 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. . . . This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.").

Choice of law is very different. When a state court takes jurisdiction over a defendant, the state exercises its sovereign power by forcing the defendant to appear or face a default. The state does not relinquish its sovereign power over the defendant when it uses its choice of law analysis to apply the law of another state. According to "local law theory," because state law has no direct force beyond its borders, when a court uses choice of law to apply the substantive rules of another state, the court "enforces not a foreign right but a right created by its own law."[103] In other words, the court is applying forum law dressed up to look like the law of another state. Regardless of its choice of law decision, the forum court is therefore exercising the sovereignty of its own state. In the analogous context of *Erie*, it is apparent that, when a federal court applies state law in a diversity case, the federal sovereign power is nevertheless at play and must be justified. The same is true in a horizontal choice of law problem—the forum state exercises its sovereign power over the defendant regardless of what substantive law it applies. The issue in a choice of law problem is whether a state court, as a matter of respect for the policies and interests of another state, should exercise its discretion to apply that state's law, not whether the sovereign power of a sister state will somehow control the forum court. Unlike

103. WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 21 (1942). The basic idea of local law theory is widely accepted among conflicts scholars. *See* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1843 (2005) ("[T]he theory is hard to deny; that a forum will sometimes apply a 'rule of assimilation' and shape its law to mirror the substance of foreign internal law is an important insight."); Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There is No Law but Forum Law*, 28 VAL. U. L. REV. 1, 3 (1993) ("In reality, a state can only create and apply its own law."); Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 843 (1991) (book review) ("If the decision is the law in the case, then in this sense forum law is *always* applied, even though the forum court may look to foreign rules or principles to find guides for its decision."); *cf.* Rhodes, *supra* note 46, at 623 ("Courts are themselves lawmakers, fashioning legal standards embodied in their judgments to provide guidance for future controversies, either when applying the common law or interpreting the statutory law from their own state or from another state."). Local law theory is primarily associated with Walter Wheeler Cook, but its basic insight was accepted by both Justice Joseph Story and Joseph Beale, the major pre-modern thinkers in choice of law. *See* Roosevelt, *supra*, at 1842–1843, n.73 (discussing Cook and Beale regarding the local law theory). Although some scholars have disparaged local law theory as a truism of little value, they do not dispute its validity. *See* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 998 (1991) ("Lacking a comprehensive alternative vision, the local law theorists also lacked the conceptual tools necessary to decide how to treat foreign choice-of-law rules. Hence, their solutions are similarly question begging.").

adjudicatory and regulatory jurisdiction, choice of law is not about the scope of a state's sovereign power.[104]

Although the Supreme Court has imposed constitutional restrictions on a state court's discretion to apply its own law, these rules are not based on the scope of state sovereignty.[105] Originally, before the Due Process Clause applied to the states, there were no constitutional restrictions on a state's choice of law.[106] At the same time that sovereignty was at its apex in the context of adjudicatory jurisdiction (i.e., the *Pennoyer* framework), it was therefore seen as irrelevant to choice of law. Although the Court has subsequently held that the Constitution places limitations on a state court's choice of law, these constitutional restrictions are remarkably toothless.[107] Under the modern doctrine, a state must have "a significant contact . . . creating state interests, such

104. *See* Rhodes, *supra* note 46, at 623 ("Choice-of-law limitations cannot preclude this inherent regulatory lawmaking function of the courts or limit their extraterritorial reach—only personal jurisdictional limitations can.").

105. *See* Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 MISS. L.J. 59, 107 (2014).

106. *See* Rhodes, *supra* note 46, at 620. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 246–47 (2000). In his highly influential Commentaries on the Conflict of Laws, Justice Story argued that if the "sovereign will" of the state demanded that the case be resolved under forum law, the state court must apply forum law regardless of the circumstances. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 23 (Boston, Hilliard, Gray, and Company 1834) ("When both [the state's statutes and the common law] are silent, then, and then only, can the question properly arise, what law is to govern in the absence of any clear declaration of the sovereign will."). The state had the power to determine which substantive law to apply because, according to Story, "[i]t is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty." *Id.* at § 8. A state court therefore "cannot be commanded by another" state to recognize or enforce its laws. *Id.* As another influential commentator, Chancellor James Kent, explained, "[I]f a statute . . . was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 100 (1827). Although Story believed a state court should consider the interests of other states, a decision to apply the law of a different state would only have been a matter of "comity." Story, *supra*, at § 29, § 36.

107. *See, e.g.*, Andrew D. Bradt, Atlantic Marine *and Choice-of-Law Federalism*, 66 HASTINGS L.J. 617, 626 (2015) (arguing that the Court essentially gives the states free reign in choice of law); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 444 (1982) (calling the test "minimal scrutiny").

that choice of its law is neither arbitrary nor fundamentally unfair."[108] Much to the chagrin of some conflicts scholars, the Court does not actively police state choice of law decisions, and, unlike in the regulatory context, it has very little concern, if any, for state sovereignty.[109]

A concrete example may help to demonstrate why choice of law does not provide the best model for determining when a state has the sovereign power to adjudicate a case. Suppose a Virginia court exercises jurisdiction over a case, applies the law of Maryland, and issues a judgment against the defendant. The judgment has legal force within Virginia only because the people of Virginia have given such power to its courts. This exercise of Virginia's judicial power must be justified, wholly apart from the question of what law may apply. The Virginia court's decision to apply the substantive law of Maryland does not change this analysis, because the judgment is still an exercise of Virginia's sovereign judicial power. The Virginia court merely borrowed legal standards from Maryland to guide the court's exercise of sovereignty.[110] Virginia's

108. *Phillips*, 472 U.S. at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981)).

109. Although the Court has cited the Full Faith and Credit Clause in this context, the Court's focus is on providing fair notice to the defendant and protection against arbitrary state action under the Due Process Clause. *See, e.g.*, David A. Linehan, *Due Process Denied: The Forgotten Constitutional Limits on Choice of Law in the Enforcement of Employee Covenants Not to Compete*, 2012 UTAH L. REV. 209, 213 (2012) ("[T]he Full Faith and Credit Clause has lost its significance as an independent constraint on choice of law, effectively becoming redundant to the protections of due process."); Florey, *supra* note 63, at 1080–81 (stating that fairness to the defendant is the Court's central concern). The Full Faith and Credit Clause does not require any particular choice of law system or otherwise import sovereignty considerations into the doctrine. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 297 (1992) ("The Full Faith and Credit Clause thus assumes the existence of choice-of-law rules, but it does not specify what those rules are."); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 594 (2003) ("The Full Faith and Credit Clause makes sense only in conjunction with choice-of-law rules specifying which state's statutes control which issues . . . [M]embers of the founding generation expected the necessary choice-of-law rules to come from the general law of nations . . . ."). I have argued elsewhere that the Full Faith and Credit Clause's application to state "acts" has no bearing at all on choice of law; instead, it represents an evidentiary rule that requires a state court to accept the statutes of another state into evidence as conclusive evidence of the applicable law in that state. *See* Schmitt, *Full Faith and Credit*, *supra* note 73, at 531–32.

110. By the same token, no one would think that an arbitrator who borrowed substantive legal standards from Maryland was somehow wielding the sovereign power of Maryland. Instead, the arbitrator's power is justified by the consent of the parties. Just as the Virginia court cannot exceed the scope of Virginia's sovereignty, so too the arbitrator cannot exceed the scope of the parties' consent.

sovereign power to decide the applicable legal standards (i.e., its choice of law) is subject only to minimal scrutiny to prevent arbitrary decisions and to protect the defendant's Due Process right to fair notice. Unlike in the regulatory and personal jurisdiction contexts, the geographical limitations of state sovereignty are not at play in choice of law.

B. The Implications of a Regulatory Approach to Sovereignty in Specific Jurisdiction

A regulatory model of sovereignty would place significant limitations on when a state court could exercise specific jurisdiction over an out-of-state defendant.[111] In *Healy v. Beer Institute*,[112] the Supreme Court held, not only that a state cannot directly regulate extraterritorial conduct, but also that it may not regulate in-state conduct when doing so has the "practical effect" of controlling conduct that occurs wholly outside the state's borders.[113] A broad interpretation of this rule, however, would invalidate most run-of-the-mill state economic legislation, because most state legislation has some practical effects beyond

111. These limitations apply only to regulations of out-of-state conduct. A state's police power includes a general power to regulate in-state conduct, subject only to the limitations imposed by the Constitution. This power to regulate in-state conduct corresponds to general jurisdiction over a domiciliary or in-state corporation. Daimler AG v. Bauman, 134 S. Ct. 746 (2014). This insight, however, does not resolve the difficult issue of when a corporation should be considered physically present in the forum. The Court's most recent formulation, which allows general jurisdiction only when a corporation is "at home," is one of many possible approaches to determine when a corporation is physically present or the equivalent of a domiciliary. *Id.* at 760. *But see* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction after* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 107 (2015) (asserting that *Daimler* "trespasses on the power of states"); Rhodes & Robertson, *supra* note 11, at 264–65 ("The state's interest in protecting its citizens lies at the heart of the adjudicatory system; jurisdictional limits that counteract the state's ability to enforce its legislative priorities necessarily erode the judicial safeguards within our federal system.").

112. Healy v. Beer Inst., 491 U.S. 324 (1989).

113. *Id.* at 336. Such indirect extraterritorial regulation provides the best analogy to personal jurisdiction. A state court is also unable to directly assert judicial power over an out-of-state defendant. A court in Virginia, for example, cannot unilaterally render and enforce a judgment against an unconsenting defendant in Maryland. Instead, the Virginia judgment would be directly enforceable only against the defendant's assets in Virginia. If the plaintiff wanted access to the defendant's assets in Maryland, he would need to ask a Maryland court to enforce the Virginia judgment. While the Maryland court must comply under the Full Faith and Credit Clause—and thus the Virginia judgment would have practical effects in Maryland—the Virginia judgment has no direct coercive power outside of Virginia.

its borders.[114] The lower courts have therefore narrowed the reach of *Healy's* practical effects test.

Although a full exploration of the constitutional limitations on extraterritorial state regulation is beyond the scope of this Article, the lower courts have generally found that, if a state law does have the practical effect of regulating extraterritorial conduct, the state must have a sovereign interest in the extraterritorial conduct being regulated.[115] In *National Electric Manufacturers Ass'n v. Sorrell*,[116] for example, the U.S. Court of Appeals for the Second Circuit upheld a Vermont law requiring that fluorescent light bulbs sold in Vermont be labeled as containing mercury.[117] Citing *Healy*, the plaintiff light bulb manufacturers argued that the law would have the "practical effect" of forcing them to attach the Vermont label to light bulbs sold throughout the country due to their national distribution processes.[118] The Second Circuit, however, held that the plaintiff's "extraterritoriality contention fails because the statute does not inescapably require manufacturers to label all lamps wherever distributed."[119] The court explained: "To avoid the statute's alleged impact on other states, lamp manufacturers could arrange their production and distribution processes to produce labeled lamps solely for the Vermont market and then pass much of the increased costs along to Vermont consumers in the form of higher prices."[120] In other words, the Vermont law was constitutional because it only regulated out-of-state conduct associated with goods bound for Vermont. The sovereign interests of Vermont—protecting the health, safety, and general welfare of its inhabitants—were clearly implicated by such conduct.

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114. *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring) ("The modern reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many."); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1521 (2007) ("In practice, states exert regulatory control over each other all the time.").

115. For a more complete analysis, see Schmitt, *Extraterritoriality*, *supra* note 64, at 877 (discussing the dormant Commerce Clause's extraterritoriality doctrine); *cf.* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 871 (2002) ("[S]tates frequently have the power to exercise legislative jurisdiction over persons whose out-of-state activities undermine legitimate state interests."). A sovereign interest is one tied to the state's police powers to legislate for the safety, health, and general welfare of people within its borders.

116. 272 F.3d 104 (2d Cir. 2001).

117. *Id.* at 107.

118. *Id.* at 110.

119. *Id.*

120. *Id.*

Not only do other Circuit Court cases use the same reasoning as *Sorrell*,[121] but this reasoning also helps to distinguish Supreme Court cases like *Healy*. In *Healy*, a Connecticut law required any out-of-state company that sold beer to Connecticut wholesalers to affirm to the state that it was not offering lower prices in any neighboring state for the next month.[122] This law, the Court held, was unconstitutional because it had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."[123] Connecticut essentially used in-state sales as a hook to regulate wholly out-of-state transactions: sales between out-of-state beer distributors to stores in other states.[124] Unlike the lightbulbs bound for the Vermont market in *Sorrell*, Connecticut had no sovereign interest in beer sales to customers in another state.

The Supreme Court's most recent case on extraterritorial state regulation, *Pharmaceutical Research & Manufacturers of America v. Walsh*,[125] further supports this interpretation. In *Walsh*, Maine required drug companies to enter into rebate agreements with the state for drugs sold to Maine Medicaid patients. Under these rebate agreements, the drug companies paid a percentage of the revenue generated from sales in Maine to the state.[126] This money was in turn given to pharmacies that agreed to sell the drugs at a discount to Maine residents.[127] Because the out-of-state drug company plaintiffs in *Walsh* did not sell their products directly into Maine, but instead sold only to out-of-state wholesalers, they argued that the Maine plan had the practical effect of

121. *See, e.g.*, Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010); Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995).

122. Healy v. Beer Inst., 491 U.S. 324, 326–27 (1989).

123. *Id.* at 337.

124. Unlike the light bulb manufacturer in *Sorrell*, the only way for the beer distributors in *Healy* to avoid the extraterritorial effect of Connecticut's regulation was to stop selling goods in Connecticut. However, this was essentially an unconstitutional condition, because, under the dormant Commerce Clause, the beer distributors have a right to sell their goods throughout the country. Connecticut therefore could not condition the exercise of this economic right on submission to a regulation of a wholly out-of-state transaction. For the Connecticut law to pass constitutional muster, the beer distributors would have had to have had some way to avoid the application of Connecticut's regulation to wholly out-of-state transactions.

125. 538 U.S. 644 (2003).

126. *Id.* at 670. *See also* Brannon P. Denning, *The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: the Case of the Missing Link[age]*, 29 AM. J.L. & MED. 7, 9 (2003).

127. Denning, *supra* note 126, at 10. If a drug company did not agree to give the rebates, Maine subjected its drugs to a time-consuming and costly pre-approval process before its drugs could be prescribed to Maine Medicaid patients. *Id.*

regulating extraterritorial conduct, that is, the wholly out-of-state transaction between the drug company and the wholesaler.[128]

In *Walsh*, the Supreme Court rejected this argument and upheld Maine's regulation. The Court reasoned that Maine's regulation "does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect."[129] This statement, however, is not technically true, because the law does regulate the wholly out-of-state transaction between the producer and the wholesaler. As the First Circuit's reasoning below made clear, however, this out-of-state effect was not constitutionally problematic because Maine regulated only out-of-state transactions concerning goods bound for Maine.[130] In other words, Maine's statute was constitutional because it exclusively applied to transactions in which Maine had a sovereign interest in protecting the health and welfare of its citizens.

The Ninth Circuit's recent decision in *Rocky Mountain*[131] further illustrates that, in the regulatory context, the state must have a sovereign interest, not only in the regulation, but also in the extraterritorial conduct being regulated. In *Rocky Mountain*, California enacted a regulation designed to reduce carbon emissions associated with in-state fuel use.[132] Under this regulation, all fuel sold within California was assigned a carbon intensity rating based on the emissions generated over the fuel's lifecycle, including production, distribution, and ultimate use.[133] The state then placed economic incentives on companies selling fuel in California to minimize carbon intensity ratings.[134] A group of out-of-state companies involved in the production and distribution of ethanol challenged the regulation, claiming that it was unconstitutional because it had the effect of regulating their wholly out-of-state conduct.[135] The Ninth Circuit, however, upheld the California regulation by reasoning that, while California "cannot peacefully impose its own regulatory standards on another jurisdiction," the State "may regulate with reference to local harms, structuring its internal markets to set incentives

128. *Walsh*, 538 U.S. at 669–70.

129. *Id.* at 669.

130. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81–83 (1st Cir. 2001).

131. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).

132. Cal. Health & Safety Code § 38562(a) (West 2014). *See Corey*, 730 F.3d at 1080 (discussing the emissions standard at issue).

133. *Corey*, 730 F.3d at 1081.

134. *Id.* at 1080.

135. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1078 (E.D. Cal. 2011).

for firms to produce less harmful products for sale in California."[136] In other words, the court found that California's regulation was constitutional because the plaintiffs' out-of-state conduct implicated California's sovereign interest in protecting its citizens.

These cases illustrate the key difference between the choice of law model and the regulatory model of sovereignty. Under the choice of law model, a state court should have the power to exercise jurisdiction whenever it has an interest in the resolution of the case. The regulatory model, however, requires the state to have an interest in the out-of-state conduct of the defendant. In *Rocky Mountain*, for example, although California has a strong interest in reducing carbon emissions throughout the country to reduce global warming, such an interest would not justify California in applying its regulation to conduct wholly unconnected to the state. California presumably could not require out-of-state companies that sell fuel in California to reduce carbon emissions with respect to unrelated sales in other states.[137] Unlike in the choice of law context, a state can regulate extraterritorial conduct only when it has a sovereign interest in the out-of-state conduct being regulated.

The state interest requirement is implicit in the nature of state sovereignty, or, in the words of the Court, "the autonomy of the individual States within their respective spheres."[138] Without some limitations on a state's ability to use in-state conduct as a hook to regulate wholly out-of-state conduct, a state could exceed its sphere of sovereign power and regulate much of the country. With its massive market power, California, for example, could condition in-state sales on a company adopting sweeping environmental or labor standards for its national operations. As detailed above, however, the state of California derives its sovereign power from the people of California, and the people of California lack the authority to set national policy. As the Supreme

136. *Corey*, 730 F.3d at 1104.

137. Such a regulation would resemble the price affirmation law at issue in *Healy* discussed at *supra* note 112 and accompanying text.

138. Healy v. Beer Inst., 491 U.S. 324, 336 (1989). Similarly, the Court in *BMW* stated: "We think it follows *from these principles of state sovereignty and comity* that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." BMW of N. Am. v. Gore, 517 U.S. 559, 572 (1996) (emphasis added). Although the Court has based limitations on punitive damages in the Due Process Clause rather than the dormant Commerce Clause, *see* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."), the Court's limitations on punitive damages are based in the same fundamental federalism concerns. *See* Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 13–30 (2004); Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1016 (2011).

Court has stated, "[n]o state can legislate except with reference to its own jurisdiction."[139] State sovereignty also precludes a blanket prohibition on all regulations that have extraterritorial effects. Because most state regulations have effects far beyond their borders, a blanket prohibition would prevent a state from using its police power to protect the health, safety, and welfare of its citizens, or, in other words, it would prevent the state from serving valid interests within the scope of its sovereign power. The cases balance these concerns by preventing a state from regulating conduct beyond its borders unless doing so is necessary to serve an interest within the scope of the sovereign power of the state. In this way, each state retains meaningful sovereign power without unduly infringing on the sphere of power of another state.

Understanding the inherent limitations on extraterritorial state power illuminates the manner in which sovereignty influences the law of personal jurisdiction. Although sovereignty can explain the basic structure of the doctrine, it does not explain the full range of constitutional restrictions imposed by the Court. By logical implication, whenever sovereignty does not justify the doctrine, some other value, such as consent or reciprocity, must be motivating the Court.

Sovereignty helps to explain the minimum contacts requirement in specific jurisdiction. Scholars have debated whether the Court's defendant-centered approach to contacts is based on fairness to the defendant resulting from the receipt of benefits,[140] state sovereignty,[141] or an unthinking reliance on history.[142] Those who turn to sovereignty contend that contacts ensure the state has a sufficient interest to adjudicate the

139. Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881).

140. Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987).

141. Weinstein explains as follows: "Territorial-based rules, such as the 'minimum contacts' requirement, promote interstate federalism by 'ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" Weinstein, *supra* note 10, at 213 n.171 (quoting World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286, 292 (1980)). Weinstein also states that ignoring sovereignty would "raise[] the question of why state borders remain a central feature of jurisdictional doctrine." *Id.* at 213. *See also* Redish, *supra* note 7, at 1117 ("Accordingly, the requirement that there must always be 'minimum contacts' with the state of the forum cannot be explained in terms of fairness alone. Rather it must also be based on the notion that without 'minimum contacts' a state can have no interest that would justify its hearing the case." (quoting Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1591–92 (1978))).

142. *See* Borchers, *supra* note 10, at 63 (asserting that "[i]n a certain sense . . . '[m]inimum contacts' was a metaphor to explain the metaphor of corporate presence").

case.[143] But this intuition does not explain why the Court requires contacts between the state and the *defendant* rather than merely contacts between the state and the *controversy*. Looking to the regulatory context provides the missing link. In that context, a state may not wield coercive power extraterritorially simply because doing so would serve a state interest; instead, the state must have an interest in the extraterritorial conduct that is being regulated. As explained above, despite having a strong interest in global warming, California cannot use in-state sales of ethanol as a hook to regulate how ethanol is produced and sold throughout the country.[144] And yet, the Ninth Circuit has held that California may effectively regulate how ethanol *that is sold in California* was produced and distributed in other states.[145] Just as the out-of-state party's extraterritorial conduct must implicate an interest within the scope of the sovereign power of the state in the regulatory context, for a state court to assert personal jurisdiction over a defendant, the defendant must have engaged in conduct that implicated the state's sovereign authority.

Although sovereignty explains why the defendant must have contacts with the forum state, it does not justify the Court's further requirement that such contacts be "purposeful." In the regulatory context, a state regulation is constitutional so long as the out-of-state conduct being regulated implicates the sovereign interests of the regulating state. The courts simply do not stop to inquire into the out-of-state party's purpose. In *Sorrell*, for example, when the Second Circuit upheld a Vermont labeling law that had the practical effect of regulating the out-of-state manufacturing of lightbulbs bound for the Vermont market, the court did not consider whether the manufacturers had purposely availed themselves of the Vermont market.[146] The manufacturers' purpose was not relevant to the issue of the state's sovereign power to regulate for the protection of its residents. Similarly, in *Rocky Mountain*, the Ninth Circuit did not consider whether the ethanol producers and distributors had the purpose of sending their products to California.[147] No court has suggested that a state's exercise of extraterritorial regulatory power is dependent on the regulated party's purpose.

As a matter of sovereignty, a state court should likewise have the power to exercise jurisdiction over an out-state-defendant that did not purposefully avail itself of the forum. A state must be able to wield coercive power that has effects beyond its borders in the modern world.

143. *See* sources cited *supra* note 11.

144. *See supra* text accompanying notes 131–137. For example, California could not tell an Ohio company that, if it wanted to sell ethanol in California, it must comply with California standards for the ethanol sold in all fifty states.

145. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1079–80 (9th Cir. 2013).

146. Nat'l Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104, 110 (2d Cir. 2001).

147. *Corey*, 730 F.3d at 1107.

As explained above, if a state lacked the power to regulate in-state conduct in a way that caused extraterritorial effects, state sovereignty would be eviscerated in our modern interconnected nation. And, if a state can pass a regulation that has the practical effect of regulating an out-of-state party without his consent or purposeful election of benefits, a state should be able to effectively require that same party to appear in court. State sovereignty simply supplies no reason to limit a state's adjudicative power in a way that does not apply to its regulatory power.

A deep look at sovereignty therefore highlights its influence on the blackletter doctrine. The doctrine's requirement that the defendant have contacts with the forum is fully supported by sovereignty concerns. Even if the Court adopted a minimalist view of fairness, as many scholars have advocated,[148] sovereignty would thus nevertheless dictate that the contacts requirement remain. Sovereignty, however, does not explain the doctrine's controversial purposeful availment requirement. Any justification for this requirement therefore must come from fairness concerns related to the Due Process Clause.

IV. *NICASTRO* AND THE STREAM OF COMMERCE

This Article's conclusions on the role of state sovereignty could help to bring clarity and coherence to the law of personal jurisdiction. Being able to identify which policy justification is at play—sovereignty or fairness—would go a long way towards helping the courts resolve a number of ambiguities in the doctrine. Because a full discussion of all unresolved issues within the law of personal jurisdiction is beyond the scope of this Article, this Section details how a regulatory approach to sovereignty could inform the stream of commerce issue that prompted the Court's most recent debate over sovereignty in *Nicastro*.

Robert Nicastro seriously injured his hand while using a metal-shearing machine in New Jersey.[149] The defendant, J. McIntyre Machinery, Ltd., produced the machine in England and shipped it to an Ohio-based distributor that handled all of J. McIntyre's U.S. sales.[150] The distributor then sold the machine to the plaintiff's employer in New Jersey.[151] The record showed that up to four other J. McIntyre machines were sold in New Jersey, but J. McIntyre did not directly advertise or promote its products in the state.[152] Although J. McIntyre therefore did not specifically target New Jersey, it sold its products into the stream of commerce knowing they could end up in any U.S. state.

148. *See, e.g.*, Trammel, *supra* note 46, at 546–47.

149. J. McIntyre Mach., LTD. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).

150. *Id.* at 2786, 2796.

151. *Id.* at 2791.

152. *Id.* at 2790. J. McIntyre attended trade shows in several other states. *Id.*

In his plurality opinion in *Nicastro*, Justice Kennedy found that the court lacked jurisdiction because J. McIntyre had not purposefully availed itself of New Jersey. According to Kennedy, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."[153] Kennedy therefore would have found jurisdiction only if J. McIntyre had specially designed its goods, specifically marketed, or otherwise targeted New Jersey. Because J. McIntyre targeted the U.S. market in general rather than "engag[ing] in conduct purposefully directed at New Jersey," Kennedy found that the New Jersey court lacked personal jurisdiction.[154]

Kennedy strongly indicated that his restrictive approach to jurisdiction in the stream of commerce context was compelled by sovereignty concerns. He began his discussion of jurisdiction by stressing the role of sovereignty. Comparing adjudicatory jurisdiction to regulatory jurisdiction, he stated:

> The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.[155]

Kennedy also called sovereignty a "central concept" in the law of personal jurisdiction and stated that "jurisdiction is in the first instance a question of authority rather than fairness."[156] He further criticized the dissent's approach as being "inconsistent with the premises of lawful judicial power."[157] In fact, Kennedy's opinion uses the words "sovereignty" or "sovereign" seventeen times.

And yet, despite all this talk of sovereignty, Kennedy's opinion does not explain how sovereignty actually informs the blackletter doctrine. Kennedy cites *Hanson* for the proposition that "the sovereign's exercise

153. *Id.* at 2788. Kennedy also stated: "The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." *Id.* at 2789.

154. *Id.* at 2790.

155. *Id.* at 2786–87 (citation omitted).

156. *Id.* at 2788–89.

157. *Id.* at 2789. Although Kennedy made this remark while commenting on Justice Brennan's concurring opinion in *Asahi*, Justice Ginsburg's dissenting opinion in *Nicastro* uses the same reasoning. *Id.* at 2800 (Ginsburg, J., dissenting).

of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State.'"[158] Without any explanation, he then abruptly moves from "purposeful availment" to a discussion of when a defendant "may submit to a State's authority."[159] He ultimately concludes that, when a defendant purposefully avails itself of the forum, "it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State."[160] Purposeful availment, therefore, is significant for Kennedy because it indicates submission to jurisdiction. However, Kennedy made no attempt to explain how sovereignty concerns dictate that a state may assert adjudicatory jurisdiction only over submitting defendants.

Kennedy's failure to tie his test to sovereignty is not surprising, because a state's power is not limited to individuals who purposefully submit to its authority. In both the regulatory and adjudicatory contexts, state sovereignty includes power over out-of-state conduct that implicates the sovereign interests of the state. Here, the out-of-state conduct is the sale of goods into the stream of commerce, and the state has a sovereign interest in protecting its residents from unsafe or otherwise defective goods and allowing its residents to be compensated for in-state injuries. As explained above, the manufacturer's purpose or intent is irrelevant in the regulatory context. To regulate the in-state sales of products that were produced elsewhere, the state need not prove that the manufacturer somehow targeted the state.[161] The manufacturer's intent therefore should also be irrelevant to the scope of state sovereignty in the adjudicatory context. When a manufacturer sells a good knowing it may end up in a particular state, this conduct implicates that state's interest in protecting the health, safety, and general welfare of its inhabitants. If a state can indirectly regulate the manufacture of out-of-state goods bound for an in-state market, the state should also be able to hear cases arising from in-state sales.

The court in *Sorrell*, for example, never stopped to ask whether the lightbulb manufacturers purposefully sold their products into Vermont. The labeling requirement applied to all lightbulbs sold in Vermont, regardless of whether the manufacturer directly sold into Vermont—thus "submitting" to the regulation—or sold to an out-of-state distributor that then sold to buyers in Vermont. The court in *Sorrell* upheld the Vermont regulation because the lightbulb manufacturers could have avoided the extraterritorial effects of the regulation by selling different lightbulbs without the label to the rest of the country.[162] In other words,

158. *Id.* at 2787 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

159. *Id.*

160. *Id.* at 2787–88.

161. *See supra* Part III.B.

162. Nat'l Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104, 110 (2d Cir. 2001).

the regulation did not inescapably regulate any out-of-state conduct other than the sale of lightbulbs bound for Vermont. The regulation was constitutional—even though it had no purpose or intent requirement—because the manufacturers were not legally compelled to change their wholly out-of-state conduct as a condition of doing business in the state.

Applying these principles to the stream of commerce context would support a broad approach to jurisdiction. Just as a state is free to regulate in-state conduct so long as it leaves the regulated party with the ability to structure its conduct to avoid any coercive out-of-state effects, a state's assertion of sovereign power over a defendant in the adjudicatory context should be constitutional so long as the defendant was able to structure its conduct to avoid jurisdiction. Suppose a manufacturer in state X that sells its goods to a distributor in state Y is concerned about the tort law of state Z. As a matter of contract law, the manufacturer could prohibit its distributors from selling into state Z or create a special (and presumably more expensive) product for sale in state Z that would meet state Z's legal standards. A manufacturer faced with a stream of commerce issue is thus in a position that is analogous to the manufacturer of the lightbulbs in *Sorrell*. The court in *Sorrell* held that Vermont had the power to require that all lightbulbs sold in Vermont to have special labels because the manufacturers were not required to sell such lightbulbs in other states.[163] The manufacturers could have elected to produce special lightbulbs only for the Vermont market, or, if compliance was too expensive, stop selling in Vermont. Vermont was therefore not exceeding its proper sphere of sovereign power. In the stream of commerce context, a court in state Z similarly would not exceed its sphere of adjudicatory power because the manufacturer in state X could have produced specialized goods for state Z or prohibited its distributors from selling in state Z. It would be incongruous to allow Vermont to indirectly regulate out-of-state manufacturers while not allowing state Z to assert jurisdiction. When a defendant engages in conduct that implicates the sovereign interests of the forum but had a meaningful opportunity to avoid doing so, the state does not act beyond its proper sphere of sovereign authority by asserting jurisdiction over the defendant.

Ironically, although Justice Ginsburg declared that state sovereignty is not an appropriate consideration,[164] sovereignty would actually support her approach to stream of commerce cases. In her dissenting opinion in *Nicastro*, Ginsburg stated that the defendant's sales into the stream of commerce with knowledge that the goods could reach the forum should be a sufficient contact to support jurisdiction.[165] Unlike

163. *Id.*

164. *Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting).

165. *Id.*

Kennedy, she therefore would not require any additional conduct specifically targeted at the forum state. Because a state has a sovereign interest in a manufacturer's sale of goods when it is reasonably foreseeable that they could reach the state regardless of whether the manufacturer purposefully targeted the forum, Ginsburg's approach is fully consistent with the scope of state sovereignty.

Recognizing that sovereignty does not compel Kennedy's restrictive approach to stream of commerce jurisdiction makes it apparent that some other value must be at play. Kennedy's focus on "submission" is likely based on substantive due process notions of fairness. Perhaps he means to say that a state court can exercise jurisdiction over an out-of-state defendant only if the defendant tacitly consented to jurisdiction.[166] Or, he may mean that jurisdiction is fair only when the defendant availed itself of some reciprocal in-state advantage.[167] Under either theory, the constitutional value at play is a Due Process fairness requirement. In the stream of commerce context, this means that he would deny a convenient forum to an injured plaintiff because he thinks forcing a manufacturer to defend a lawsuit in a state where its products are sold would be so unfair that it violates Due Process. Although Kennedy attempts to pin this result on state sovereignty, substantive Due Process fairness concerns are to blame.[168]

CONCLUSION

The scope of state sovereignty mandates that state courts do not have unlimited jurisdiction over out-of-state defendants. Whereas the Constitution limits the powers of the federal government by subject matter, structural principles inherent in our federalist system dictate that state sovereignty is instead limited by geography. The scope of a state's sovereign power should therefore be the same in the regulatory and adjudicatory contexts. And, just as the people of one state cannot regulate the entire country, they also cannot adjudicate all of the nation's controversies.

The constitutional limitations on a state's extraterritorial regulatory power, which are wholly based on sovereignty concerns, help identify sovereignty's place within the law of personal jurisdiction. In the regulatory context, a state may indirectly regulate out-of-state conduct

166. *See* sources cited *supra* note 8 (arguing that personal jurisdiction should be based on consent).

167. *See* sources cited *supra* note 10 (arguing that personal jurisdiction should be based on reciprocity).

168. Kennedy's approach therefore fits within the Roberts Court's pro-corporation constitutional jurisprudence. *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 172–91 (2014). Although it is beyond the scope of this Article, similar analysis could be given for the Court's recent decision in Walden v. Fiore, 134 S. Ct. 1115 (2014).

only when such conduct implicates the state's sovereign interests in the health, safety, and general welfare of its residents. A state court's adjudicatory power should therefore likewise be limited to defendants whose conduct invoked the state's sovereign interests. The choice of law model, which would broadly allow jurisdiction whenever the state has an interest in the resolution of the case, does not fully account for the geographical limitations on state power.

Applying these principles to *Nicastro*, the Court's most recent debate over sovereignty, produces an interesting result. Although Justice Kennedy strongly implies that his limited reading of jurisdiction in stream of commerce cases is compelled by sovereignty concerns, the state of New Jersey had a sovereign interest in the defendant's conduct. Kennedy's approach, therefore, must be based on something else. In all likelihood, the Court's recent curtailment of specific jurisdiction is based on a perceived need to shield corporate defendants from state courts as a matter of substantive Due Process.